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FILED

JUN 22 19

No. [redacted] 29 4

IN THE

SUPREME COURT OF THE UNITED STATES

CLARENCE CALDWELL, Petitioner,

vs.

THE TRAVELERS INSURANCE COMPANY, [illegible]

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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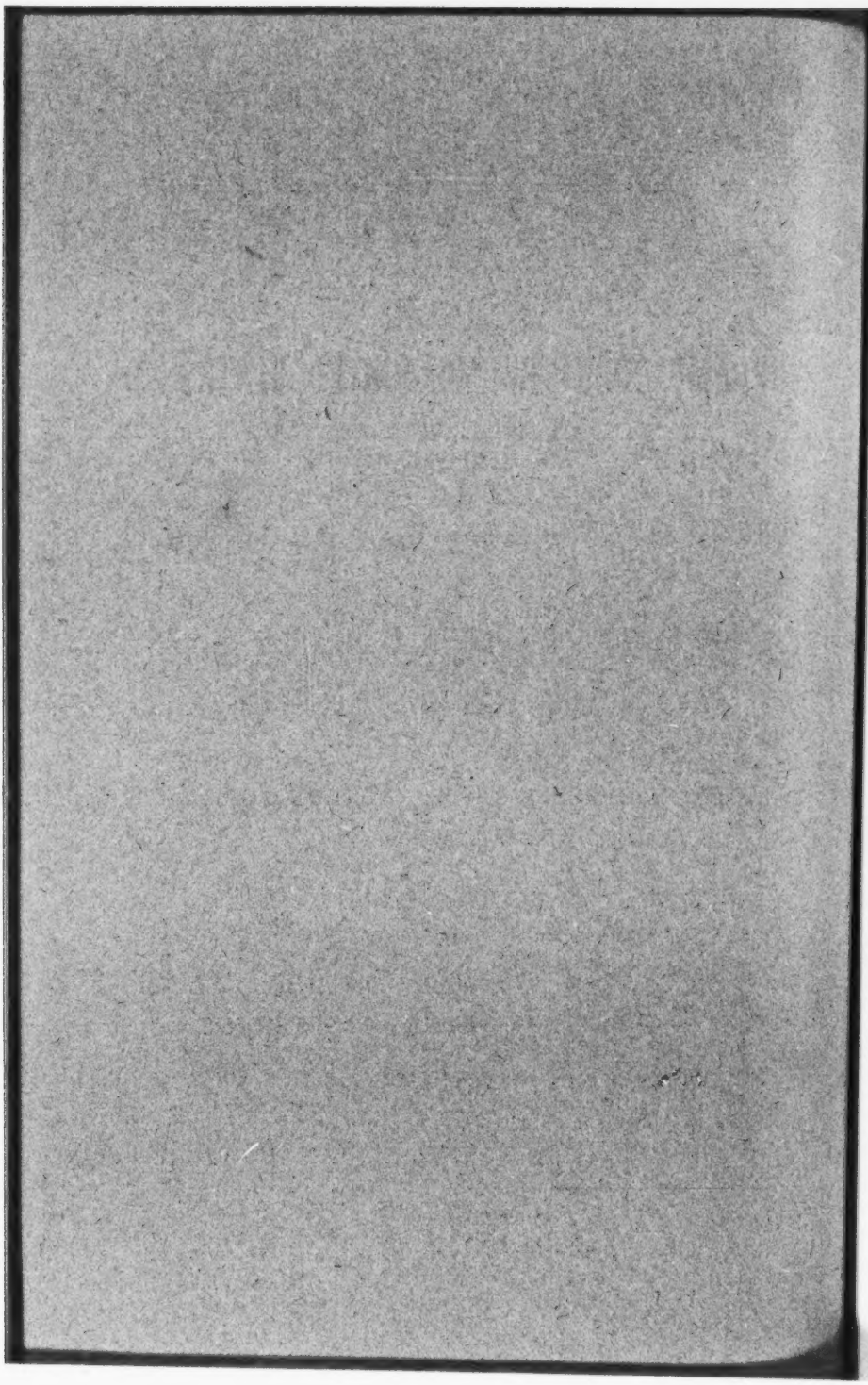

INDEX

LIST OF CASES CITED

STATUTES CITED

POINTS RELIED UPON AND AUTHORITIES

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OCTOBER TERM, 1941

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THIS IS NOT A CASE CALLING FOR CERTIORARI

RULE 38 established procedure for certiorari and Section 5 thereof states that the discretion to grant it will only be exercised where there are special and important reasons therefor, then indicates the character of reasons which will be considered.

This case presents none of the four classes enumerated. It presents no special or important reason for the granting thereof.

No decision of the Supreme Court of Arkansas is presented in conflict with this decision of the Circuit Court of Appeals. The only pretense thereof is seeking a "liberal" construction of the policy in favor of the insured, which is applicable where there is uncertainty or ambiguity in the contract of insurance, to which principle the Supreme Court of Arkansas has always adhered, as well as this Court and the Circuit Court of Appeals of the Eighth Circuit.

There is no ambiguity or uncertainty in the policy or the statute under which they were written which calls for "liberal" construction. The terms thereof are plainly stated in good English and no fraud or imposition or misunderstanding or mistake alleged to change the contracts as executed; and no other construction possible without rewriting the contract and the statute.

The District Court made Findings of Fact and drew inferences or conclusions therefrom that the insurance covered the injury.

The Circuit Court of Appeals on these Findings of Fact drew inferences or conclusion therefrom that the insurance did not cover it. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn therefrom."

General Talk Pictures Corp. v. Western Electric Co., Inc., 304 U. S. 190.

The Circuit Court of Appeals found as a matter of fact that one of the Policies was a statutory policy and the other was not. It further held that regardless of whether the policies were statutory or not, that the vehicle that caused the injury to plaintiff was being operated at the time thereof as a taxicab or carrier of passengers for hire. It is beyond contradiction that the vehicle which struck plaintiff was a taxicab. That therefore, the exclusion clauses of the policies applied and there could be no recovery by the plaintiff.

This was strictly a question of fact and should not be reviewed by this court by certiorari.

THE PETITION DOES NOT COMPLY WITH RULES 38 AND 12

The Petition does not contain a summary and short statement of the matters involved, and does not contain "the questions presented." In a word, it does "not adequately and fairly disclose the questions involved."

Sutter v. Midland Valley RR. Co. 280 U. S. 521.

The pleadings are fairly summarized; the facts are not. The Opinion of the Court states fully the facts—all

in accordance with the Findings of Fact of the District Court (except the conclusions drawn from them by that court), and discusses the many questions presented, and the facts called for in such discussion are conspicuous by their absence in the summary statement.

Thus the first question discussed and decided (and it was sufficient to dispose of the case without the other questions) was that the insurance covered only such operations as were authorized by the Commission in its Certificate and confined the coverage to operations "pursuant to the Certificate;" and cited two earlier cases of that court and one of the Supreme Court of Kansas and of two other Circuit Courts of Appeal giving like interpretations to similar policies. The reasons therefor were as follows:

The Corporation Commission had no jurisdiction, authority or supervision over the operations of a taxicab operating under license in the City of Fort Smith; and that is what the Court meant when it stated that this insurance did not cover liability incurred by the insured in operating beyond the range of its authority under its license.

The Arkansas statute vested regulations of all public carriers in the Arkansas Corporation Commission, enumerating them, including motor vehicle carriers, but followed this grant of power with a proviso excluding from its jurisdiction any regulation or authority over street railroads or other companies operating a public utility or furnishing public service where jurisdiction thereof was elsewhere vested in a municipality. Section 2002 of Pope's Digest; see Appendix A.

Section 2016—part of the same act—vested jurisdiction in municipalities over all public utilities and companies furnishing public service therein. Appendix B. This was pursuant to public policy of the State established in 1875, vesting in municipalities control of public conveyances; employing this quaint language:

> "To regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire and all de-

livery stables." Pope's Digest, sec. 9601, Appendix C.

In 1942 in *Talley v. City of Blytheville*, 204 Ark., 745 the Court quoted the above provision and applied it to municipalities licensing taxicabs—that the act was a regulatory one, not a revenue statute, and that the power to regulate includes the power to license as a means of regulating.

Therefore, the Arkansas Corporation Commission had no authority to grant a license to any public utility operating a taxicab service in the City of Fort Smith, or any other municipality in Arkansas, as it was beyond the range of its authority.

The Court adopted the statement earlier made by it (*Trinity Universal Ins. Co. v. Cunningham*, 107 Fed. (2nd) 857), that the phrase "pursuant to the Certificate," must be interpreted to exclude from the scope of the coverage vehicles not under the Commission's supervision. R. p. 99, s. c. 133 Fed. (2d) 654.

The President of these two companies—the Black and White Transfer Company and the Drivers-Owners Association—testified that the Drivers-Owners Association had a Permit from the City of Fort Smith to operate taxicabs; that the Black and White Transfer Company got a Permit from the Arkansas Corporation Commission limiting it to hauling household goods, machinery and other things mentioned and the Commission was not asked and did not grant any Permit for the Black and White Transfer Company to carry passengers (Rec. p. 42).

The Secretary testified the Black and White Cabs was a trade name under which the Drivers-Owners Association did a taxicab business in the City of Fort Smith, and it was so operating at the date of the Caldwell accident. That the business of the Drivers-Owners Association was essentially to operate taxicabs and the business of the Black and White Transfer Company was essentially to do household moving. That the Black and White Transfer Company applied to the Arkansas Corporation Commission to do business as a baggage company limited to hauling household goods, machinery and commodities. It

had no authority under its Permit to carry passengers. Record pages 43-45.

None of these facts or statements appear in the summary statement and the Findings of Fact of the District Court on them are ignored.

Finding (16), Record page 72, gives the details of Monty Robinson driving a cab, picking up a regular passenger at her house and receiving another passenger, the call for whom he had received from the Black and White Transfer Company. In carrying these two and another passenger to their various destinations in the city of Fort Smith and while in such operation the injury to Caldwell was caused by the operation of the cab so driven by Monty Robinson.

In Finding (17), Record page 73, the Court found that at the time of the injury to the plaintiff the Drivers-Owners Association was operating a public taxicab service in Fort Smith under the trade name of Black and White Cab Company, and gives the details of their operations, having some common employees and the same officers and stockholders.

Then from the various Findings the Court made Finding (21) to the effect that the taxicab which struck and injured plaintiff was at the time being operated by the insured, Black & White Transfer Company, Inc., pursuant to a license certificate granted by the Arkansas Corporation Commission.

This is a non sequitur. It is an inference or conclusion drawn by the court from the established facts. It is erroneous in that the Arkansas Corporation Commission had not issued any license to the Black & White Transfer Company, Inc., to engage in the business of transporting persons for hire in the city of Fort Smith and had no jurisdiction to do so.

Likewise the (22) Finding is a non sequitur.

Therefore, it is apparent that the Petitioner has not stated the issues involved.

ANSWERING THE ARGUMENT

The Petition, page 17, quotes the first subdivision of Paragraph "e" of Section 2025 of Pope's Digest. This section imposes duties on the Commission; others prescribes terms of the policies to be taken; "All insurance policies shall contain the following endorsement:"

The first subdivision of this Endorsement requires it to be construed under the Act of 1927, and amendments thereto; and with the rules and regulations of the Corporation Commission. Then follows this requirement:

> "In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby waives a description of the motor vehicles to be insured hereunder, and agrees to pay any fine or judgment for personal injury, including death, resulting therefrom and/or damage to property, other than insurance, caused by any and all motor vehicles operated by the assured, pursuant to a certificate issued by the Corporation Commission of the State of Arkansas within the limit set forth in the schedule shown hereon."

The balance of the endorsement is not pertinent. It is copied in Petitioner's Brief, page 8.

Therefore the generality of the first subdivision of Paragraph "e" is made into a specific form of contract between the insurer he insured, and the public in an amount fixed by th ommission, and the contract to be filed with the Commission for the benefit of the public. Therefore, it is plain that there is no coverage here for injury to persons or property resulting from negligent operation of the insured motor vehicles, unless they were in operation in pursuance to the Certificate issued by the Commission.

The Arkansas Corporation Commission issued no Certificate to the Black and White Transfer Company to operate taxicabs in the city of Fort Smith; it had no right to do so and did not do so.

It issued a certificate as a freight carrier of designated commodities in a specific area, including the City of Fort Smith. The District Court found it operated a taxi-

cab business in Fort Smith, and while doing so the injury sued for was caused by a conveyance engaged in transportation for hire (Rec. Pages 72-74). The exclusion of such vehicles from the coverage and the limitation of the coverage to the business authorized by the Commission each rendered impossible liability upon these insurance contracts.

At page 18 the Petition states that the Circuit Court of Appeals held that the insurance coverage only protected the public so long as the insured operated strictly pursuant to the certificate of the Arkansas Corporation Commission authorizing operation as a common carrier, and it is added that this was clearly writing into the statute a provision that was not found therein.

Certainly the provision is found therein as hereinbefore just quoted. There is no requirement of *strict* operation pursuant to the Certificate, but merely operations pursuant thereto. Operating a taxicab when the Company was only authorized to operate freight vehicles cannot be construed in any way other than operations outside of the Certificate. It was the Legislature that put this Limitation into the policies required to cover the operation which the Commission authorized the applicant to perform; the Commission's duty was to protect such operation and no other.

At page 20 it is stated that the driver of the vehicle that injured the Petitioner admitted he was on business for the insured, Black and White Transfer Company at the time of the accident, and quote an isolated statement from his testimony to that effect.

Turning to the testimony of this witness at Record pages 37 to 39 it is found that he got a call from the Transfer Company to pick up a passenger when he called for one of his regular passengers across the street from where his passenger resided. He stated he frequently handled calls like this, and when he received them the Transfer Company paid him therefor and he did not collect anything from the passenger, but got it from the Transfer Company. This was what he meant when he said he was on business for the Transfer Company—which in a sense was true—but does not change the fact that

the vehicle that caused the injury to Caldwell was a taxicab operating under license from the City and the Transfer Company had no Certificate from the Corporation Commission for such operation and taxicabs were excluded from the policies.

The question of the validity of the exclusion clause in both policies, should an injury be caused by a vehicle carrying passengers for hire, is so well stated in the opinion that we will not add anything thereto.

The Brief at page 18 states that the only evidence as to the "requirements" of the Commission as to the amount of insurance was in the Binder which called for $25,000 and stated there was nothing in the record to show the requirement coverage of $25,000 was reduced by the Commission. The facts are to the contrary.

At page 7 the brief quotes from the Binder that it should terminate by issuing to the assured a duly executed policy, or policies. Then follows at page 7 a statement that the Commission received a letter dated April 28, 1938, purporting to enclose Policies No. FA-1109020 and FA-1109209, supplanting the Binder which had theretofore been filed, and then it is stated the policies are found as Exhibits 3 and 4. This is an incorrect statement of the facts. The letter referred to is found at page 23 of the record. It carries the caption of Black and White Transfer Company, Inc., and the number of both Policies—FA-1109020 and FA-1109209. The body of it states that the writer was attaching a "filing policy" and asks that the Commission acknowledge receipt of the filing of this "filing policy."

There was only one policy filed. The law required the statutory policy to be filed. The Corporation Commission certified that the only policy filed was FA-1109020, which is the Statutory Policy for $5000.

This was filed April 29th, and it was the only policy filed to cover operations of the Black and White Transfer Company, and covered the operations for the period from April 5, 1938 to April 5, 1939. Rec. pages 52-53.

The District Court's Finding of Fact (12) confirmed this Certificate of the Corporation Commission (Record page 71).

The other non-statutory policy was $25,000—including the $5000 statutory one, and these two policies satisfied the requirement of the Binder as to the amount of insurance and satisfied the Commission of the amount of it to be statutory insurance, which was evidenced by the filing copy accepted by the Commission as covering the operations for the year in question.

It is worthy of note that the writer of this Opinion had been a practicing lawyer in Arkansas for 33 years before he was appointed to the Circuit Court of Appeals. See Martindale-Hubbell Law Directory, 1943, page 38.

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